STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2005
v	No. 251271 Detroit Recorder's Court
MARK STOREY, Defendant-Appellant.	LC No. 85-007676

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant, Mark Storey, appeals as of right his bench trial convictions for first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison for the murder conviction and two years in prison for the felony-firearm conviction. We affirm.

I. Facts

Nathan Wilson worked in Detroit at the Gold Mine jewelry store ("the shop"). On November 7, 1984, he was found dead in his chair behind the counter in the shop. The employee area behind the counter was separated from the customer area by a Plexiglas partition and a sliding steel door. The owner, James Floyd, determined that gold, cash, and a handgun were missing.

Defendant's fingerprint was found on the telephone behind the counter, and he claimed that he was there to sell some stolen jewelry. Floyd testified that two weeks after the robbery and murder, defendant sold him a gold necklace that had been stolen during the robbery. At trial, Darin Henderson and David Kidd testified that defendant had told them that Wilson would be an easy target to kill and rob. Henderson wrote Floyd a letter implicating defendant, Shawn Coats, and Anthony Whitlow, and he testified that he witnessed the robbery and murder. Henderson, Kidd, and William Walls testified that defendant admitted to them that he had participated in the robbery and murder.

II. Procedural History

This is not the first time this case has been before this Court. Defendant previously appealed his convictions as of right to this Court, raising three sufficiency-related claims. *People*

v Mark Storey, unpublished opinion per curiam of the Court of Appeals, issued April 11, 1988 (Docket No. 95793). This Court affirmed his convictions, and the Michigan Supreme Court denied his application for leave to appeal. After several unsuccessful attempts at persuading the trial court to grant a new trial, defendant turned to the federal district court. On September 18, 2003, the U.S. District Court found that appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel in defendant's prior appeal to this Court. The court conditionally granted defendant habeas corpus relief unless defendant received a new appeal of right in this Court.

III. Ineffective Assistance of Counsel

Defendant argues that the trial court erred in refusing to reinstate the January 11, 1995, order finding ineffective assistance of trial counsel, which was later vacated.[1] Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

In its January 11, 1995, order and opinion, the trial court addressed the following assertions of ineffective assistance of counsel: 1) trial counsel failed to obtain discovery before trial and prepare for trial; 2) trial counsel failed to obtain evidence that Kidd expected a reduction in his sentence in exchange for his testimony against defendant; and 3) trial counsel made comments during opening statements about not knowing whether defendant would testify and not knowing the law. The prosecution appealed that order to this Court, which remanded for a determination of whether good cause existed for failing to raise the issue of ineffective assistance of counsel on appeal. The trial court concluded that no such good cause existed and vacated the order on March 10, 1995.

After the federal district court conditionally granted defendant habeas corpus relief, he filed a motion for new trial before successor Judge Michael M. Hathaway, raising the exact same argument—that the January 11, 1995, order should be reinstated because the procedural requirement of good cause was removed. Judge Hathaway found that trial counsel was not ineffective and denied the motion.[2] Defendant offers no legal support for his argument that a

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[1] After this Court affirmed defendant's convictions in 1988, defendant filed a petition for habeas corpus, which raised an ineffective assistance of trial counsel claim. Judge James R. Chylinski, who presided over defendant's trial, denied this petition. Successor Judge Harvey F. Tennen granted defendant's motion for relief from judgment and new trial on January 11, 1995, concluding that trial counsel was ineffective.

[2] Judge Hathaway specifically found that the January 11, 1995, order and opinion did not identify any specific shortcoming on the part of trial counsel that would have been outcome determinative. Judge Hathaway found the order to be "conclusory and without real instruction . . . as to what the basis for the conclusion is." Although Judge Tennen had found that trial counsel had not engaged in aggressive or adequate discovery, Judge Hathaway was unable to identify what trial counsel should have discovered or how it would have produced a different outcome.
(continued…)

vacated order should be reinstated merely because the procedural ground for vacating it has been removed. A trial court judge has authority to reconsider its own rulings, as Judge Hathaway considered Judge Tennen's January 11, 1995, order. *People v Herbert*, 444 Mich 466, 471-471; 511 NW2d 654 (1993), overruled on other grounds *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); see also MCR 2.613(B) (providing that a trial judge who is otherwise empowered to rule in a matter has the authority to set aside or vacate a judgment or order).

We will, however, consider the merits of defendant's ineffective assistance of counsel claim. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Under this standard, defendant must show that, if defense counsel had not made those remarks during his opening statement, had obtained all discovery before trial, and had obtained evidence of Kidd's alleged negotiations with prosecutors, the trial court would have acquitted defendant of the charges.

During his opening statement, trial counsel stated that the cases against Coats and Whitlow had been dismissed. When the trial court asked why that would be pertinent, counsel replied, "I am not sure. I haven't thought that through, but I hope to." The trial court stated, "This is a bench trial, Mr. Campbell, and I think I know what to disregard and what to take into consideration." Indeed, a trial judge in a criminal bench trial is presumed to know and follow the law. *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), mod 433 Mich 862; 444 NW2d 527 (1989); *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). Although it may appear from defense counsel's faltering that he was unprepared, we are unconvinced that defendant was prejudiced by these comments.

After several prosecution witnesses testified on the first day of trial, counsel was unable to locate his copy of Thomas Brown's statement and obtained another copy from the police at that time. During cross-examination of Floyd, trial counsel became confused when Floyd stated that defendant had sold him jewelry twice after the robbery and murder. During a brief recess, trial counsel located the papers and cleared up the confusion by eliciting from Floyd that one of the transactions was actually with Whitlow, not defendant. Because counsel obtained Brown's statement and quickly resolved the confusion that was created by Floyd's erroneous statement about how many times defendant sold him jewelry, we are unable to conclude that defendant suffered any prejudice.

During Walls' cross-examination, trial counsel learned that another possible witness may have made a statement to the police on the same day as Walls, and he requested discovery of such a statement. Upon further questioning of Walls, trial counsel elicited that the other person Walls suspected of making a police statement had not actually gone into the police station at that

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Judge Hathaway also acknowledged that trial counsel's admitted inadequacies "may very well have [been] calculated and Wiley [sic] efforts on the part of a seasoned defense trial lawyer to build error into the record."

time. Once again, defense counsel quickly resolved confusion that was created by Walls' testimony about another person making a police statement.

Out of concern that trial counsel might be missing a document, the trial court ordered re-discovery of the prosecutor's complete file[3] as a precaution. During this discussion, the prosecutor stated that trial counsel never filed a discovery order or presented one to the police. The trial court noted that defendant's previous attorney had filed discovery orders and that trial counsel had had a chance to see the documents. Although the fact that defense counsel did not file a discovery order may initially appear remiss, the fact that defendant had two previous attorneys must be taken into consideration. Defendant has failed to identify any prejudice that may have resulted from counsel's failure to file a discovery order, especially because counsel took advantage of the opportunity to conduct rediscovery at that time.

During cross-examination of Floyd, trial counsel stated that he did not have a copy of the letter that Henderson wrote to Floyd. It is clear, however, that he obtained a copy later because the letter was admitted during Henderson's cross-examination. Trial counsel impeached Henderson with the contents of the letter and his testimony from Coats' trial. During his closing argument, trial counsel argued extensively about the letter, maintaining that defendant was not even at the shop because the letter did not say anything about Henderson witnessing the whole incident. Accordingly, we are unable to conclude that defendant suffered any prejudice by trial counsel's late receipt of Henderson's letter.

During direct examination, Kidd testified about his plea agreements in his own case and denied that he had made any agreements with the prosecutor in defendant's case. During Officer Kenneth Day's testimony, trial counsel moved for discovery of "whatever negotiations were conducted with David Kidd on his murder case and what promises were made to him and by whom, even if the promise is to do what I could or things will be easier if I cooperate, anything of that sort." The prosecutor stated that he had no idea what the officer in charge of Kidd's case had done. Defendant has failed to show prejudice because he cannot identify any agreements that counsel failed to obtain regarding Kidd. Although we acknowledge that Kidd recanted his testimony about defendant's confession to the robbery and murder, he did not recant his testimony about not having an agreement with the prosecution. Thus, there is no evidence of any agreement that trial counsel failed to discover.

Defendant has not demonstrated that the outcome of the trial would have been different if trial counsel had not shown uncertainty about the law during his opening statement and had obtained all discovery before trial, including any negotiations Kidd may have had with prosecutors. Accordingly, we are not persuaded that defendant's trial counsel was ineffective.

IV. Prior Inconsistent Statement – Henderson's Letter to Floyd

Defendant contends that the trial court erred in declining to admit Henderson's letter to Floyd during defense counsel's cross-examination of Floyd. We review a trial court's decision

[3] Because of concerns about defense counsel seeing the prosecutor's work product, the trial court appointed an impartial attorney to supervise discovery.

to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). We also review a trial court's decision to limit cross-examination for an abuse of discretion. *People v Sexton,* 250 Mich App 211, 221; 646 NW2d 875 (2002).

A primary interest secured by the Sixth Amendment Confrontation Clause is the right of cross-examination. *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993). MRE 613(b) provides, in pertinent part, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Defendant is correct in his assertion that MRE 613(b) does not contain a reference to timing or sequence. *People v Parker,* 230 Mich App 677, 682-683; 584 NW2d 753 (1998).

During cross-examination, defense counsel asked Floyd about the contents of the letter that Henderson had written him, and the trial court sustained the prosecutor's hearsay objections. During defense counsel's cross-examination of Henderson, his letter to Floyd was admitted over the prosecutor's hearsay objection. In his letter, Henderson said, "Anthony [Whitlow] killed [Wilson]. Shawn [Coats] robbed him and [defendant] was the inside man." Although Henderson testified during direct examination that he saw defendant inside the shop, he did not mention in the letter anything about defendant being in the shop. During his closing argument, defense counsel argued extensively about the letter, emphasizing that the letter did not say anything about Henderson standing across the street and seeing the whole incident.

Although the trial court denied defendant the opportunity to question Floyd about the letter, any error was harmless. The letter was later admitted into evidence, defense counsel impeached Henderson with the contents of the letter, and it was addressed during closing arguments. *Adamski*, *supra* at 140.

V. Evidence of Other Crimes

Next, defendant challenges the admission of testimony that he committed other crimes. The decision to admit certain other acts evidence under MRE 404(b) "is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b). During direct examination, Walls referenced defendant committing "B & E's in the neighborhood." During direct examination, Henderson stated that defendant and Coats "had cocaine and pills" when he encountered them after the robbery and murder. Neither Walls' remark nor Henderson's comment was responsive to the prosecutor's proper questions. The comments were voluntary and not elicited by the prosecutor. Moreover, defendant admitted that he used marijuana and been high several times, that he had been in the youth home, that he had drunk alcohol, that his mother put him in drug rehabilitation, that Henderson was his partner in committing robberies, and that he was trying to sell stolen rings at the shop in the day of the robbery and murder.

Because a trial judge is presumed to know and follow the law during a criminal bench trial, we must presume that Judge Chylinski did not consider the comments of Walls and Henderson in making his decision. *Oliver, supra* at 49; *Garfield, supra* at 79. We therefore conclude that any error that occurred by the admission of this evidence was harmless, as defendant cannot show that any error was outcome determinative, i.e., that it undermined the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

VI. Prosecutor's Use of Leading Questions

Defendant argues that he was prejudiced by the prosecutor's use of leading questions during Henderson's direct examination. We review the admission of leading questions for an abuse of discretion. *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973).

MRE 611(C)(1) provides: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." However, reversal is not required simply because leading questions were asked during trial. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

During direct examination, the prosecutor questioned Henderson about what he saw when he was walking across the street from the shop. Henderson said that he saw Coats sitting on a brick flowerpot outside the shop. The prosecutor then asked Henderson if he "actually saw Shawn Coats coming out of the Gold Mine[.]" Defense counsel objected, and the trial court overruled the objection, directing counsel to "straighten it out" during cross-examination. During cross-examination, defense counsel confronted Henderson with the inconsistency in his testimony about whether Coats was coming out of the shop or sitting outside when Henderson first saw him. Henderson stated that he could not recall whether Coats was inside the shop or sitting outside. Defense counsel continued to question Henderson about his observations and confronted Henderson with his testimony at Coats' trial, where Henderson stated that he first saw Coats inside the shop with defendant and Whitlow. When questioned about which statement was correct, Henderson stated that both were.

During cross-examination, defense counsel questioned Henderson about the letter, eliciting that Henderson needed money and a place to live. Although Henderson testified during direct examination that he saw defendant inside the shop, he did not mention in the letter anything about defendant being in the shop. During his closing argument, defense counsel argued extensively about the letter, emphasizing that the letter did not say anything about him standing across the street and seeing the whole incident.

Although it appears that the prosecutor did use leading questions during Henderson's direct examination, reversal is not required because defendant has failed to demonstrate that he was prejudiced. *Watson, supra* at 587.

VII. Examination of Officers Day and Rice

Defendant argues that the trial court erred in refusing to allow Officer Day testify about the contents of a scene investigation report and a previous robbery and murder. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The decision frequently involves a

preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. *Id.* Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is "inadmissible as a matter of law." *Id.*

During direct examination, defense counsel asked Officer Day about the modus operandi that was used in a prior robbery and murder at another Gold Mine shop. The prosecutor objected, and defense counsel admitted that it was perhaps not relevant. MRE 103(a)(2) provides that, to preserve an issue about a trial court ruling that excludes evidence, the substance of the evidence must be made known to the court by offer or be apparent from the context within which questions were asked. *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). Because defense counsel failed to make an offer of proof about the excluded evidence, and its substance was not apparent from the context within which the question was asked, this issue has not been preserved for appellate review. MRE 103(a)(2); *Grant, supra* at 545-546. Accordingly, we must review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Defendant asserts that he was denied the opportunity to demonstrate the possibility that the same person who committed the other robbery and murder committed this one. Essentially, his defense was one of identity, that someone else committed the crimes. Because defendant fails to identify how this alleged testimony would accomplish this goal, we find his argument speculative at best. Furthermore, defendant testified that, although he was at the shop before the robbery and murder, he left and was not the one who committed the crimes. Therefore, defendant was not preventing from presenting the spirit of his defense, that he was not the perpetrator. We conclude that defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant contends that Walls, Kidd, and Henderson lacked personal knowledge of the killing and were repeating inaccurate information originating from the scene investigators about the number of gunshot wounds that Wilson sustained. During direct examination, defense counsel asked Officer Day what his report said about the number of gunshot wounds observed by the police officers who responded to the scene. The prosecutor objected on hearsay grounds, and defense counsel offered the evidence for extrinsic impeachment on a material matter. The trial court sustained the objection because it did not find that the matter was material.

An unsworn, out-of-court statement offered in evidence to prove the truth of the matter asserted cannot be admitted except as provided by the Michigan Rules of Evidence. MRE 801; MRE 802. Although defendant is correct that a statement may be offered for a nonhearsay purpose when offered for the effect it has on the listener (*People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974)), he has not identified any effect that these statements may have had on Walls, Henderson, or Kidd. The witnesses did not take any action based on hearing the alleged statement contained in the scene investigation report. The statement was, however, introduced simply to show a statement was made, which does not constitute hearsay. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). Therefore, we conclude that the trial court abused its discretion in disallowing this testimony on hearsay grounds.

The medical examiner testified that Wilson died as a result of three gunshot wounds to the head, and Walls, Henderson, and Kidd testified that defendant admitted to giving Wilson

"two to the head." The trial court addressed this discrepancy in its findings of fact, recognizing that the phrase "two to the head" is a common expression and that one gunshot may have been muffled because it was fired so close to the victim's head. We therefore find that this error was harmless because defendant's theory was presented to the trial court, which considered it in its findings of fact. *People v Herndon*, 246 Mich App 371, 410-411; 633 NW2d 376 (2001); *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992).

Defendant also challenges the trial court's decision not to allow Officer Rice to testify about his opinion of Floyd's credibility. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *Katt, supra* at 278. We review the impeachment of a witness about a collateral matter for an abuse of discretion. *Wofford, supra*, at 281.

MRE 608 provides that a witness' credibility may be attacked by opinion or reputation evidence if the testimony is limited to truthfulness or untruthfulness and the witness' character has been attacked. A police officer may testify regarding a witness' reputation for honesty in the community if he is, in fact, familiar with the witness' reputation. *People v Phillips*, 170 Mich App 675, 680-681; 428 NW2d 739 (1988). Defense counsel failed to make an offer of proof about Officer Rice's opinion of Floyd's credibility and whether he was familiar with Floyd's reputation, and its substance was not apparent from the context within which the question was asked. Therefore, this issue has not been preserved for appellate review. MRE 103(a)(2); *Grant, supra* at 545-546. Accordingly, we must review it for plain error affecting defendant's substantial rights. *Carines, supra* at 762-763.

During Floyd's cross-examination, defense counsel confronted Floyd with his police statement and addressed an inconsistency about the number of boys who accompanied defendant when he sold the stolen gold necklace back to Floyd. We find that the result of the trial would not have been different if Officer Rice had testified that Floyd had a reputation for being untruthful because defense counsel attacked his credibility during cross-examination, and the trial court considered Floyd's credibility in its findings of fact. *Whittaker, supra* at 427.

VIII. Defendant's Discovery Request

Defendant challenges the trial court's decision not to permit defendant discovery during the trial. We review a trial court's decision regarding discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

Defendants have a due process right to obtain "evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), applying *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendants also have a right to obtain evidence of any promises that have been made to witnesses in exchange for their testimony. *People v Reed*, 393 Mich 342, 352-354; 224 NW2d 867 (1975). During Officer Day's testimony, trial counsel moved for discovery of "whatever negotiations were conducted with David Kidd on his murder case and what promises were made to him and by whom, even if the promise is to do what I could or things will be easier if I cooperate, anything of that sort." The prosecutor stated that he had no idea what the officer in charge of Kidd's case had done. The trial court denied the request, finding that 1) Kidd's case had nothing to do with defendant's case; and 2) Kidd

testified that no promises were made to him. The trial court mistakenly believed that trial counsel was asking it to determine whether any promises were made to Kidd for his testimony against the codefendant in Kidd's murder case.

At the evidentiary hearing, Kidd did not recant his testimony about not having an agreement with the prosecution. Kidd testified that he was not promised anything for his testimony against defendant and that there was nothing written, but he thought that he *might* get some time off his sentence if he helped. When Kidd entered his guilty pleas, the prosecutor stated that Kidd agreed to testify against his codefendant in exchange for reductions of the charges against him. There was no mention of Kidd's testimony against defendant. At Kidd's sentencing hearing, the prosecutor informed the court that Kidd had testified against Kidd's codefendant twice as well as against defendant. Kidd received a life sentence with the possibility of parole. Although the prosecutor in Kidd's case acknowledged that he had testified against his codefendant and defendant, we conclude that there is no evidence to suggest that Kidd was promised anything in exchange for his testimony against defendant. Thus, there was nothing for defense counsel to discover.

At the trial of Jimmie Lee Simpson, Kidd's codefendant, Kidd testified that he had initially told the police that Marcus Dawson and "Mark" were the perpetrators. He told the police he did not know "Mark's" last name and explained at Simpson's trial that he made up the name Mark because he was lying and could not think of another name at the time. Defendant's name was not mentioned at Simpson's trial. Kidd did, however, testify at the evidentiary hearing in the instant case that he meant defendant when he gave police the name "Mark." Although we are unable to conclusively determine whether Kidd actually provided the police with defendant's last name, recantation testimony is "traditionally regarded as suspect and untrustworthy." *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Therefore, we are not persuaded that Kidd attempted to "frame" defendant or implicate him in another murder.

When Kidd entered his guilty pleas, his counsel informed the court that he and the prosecutor wanted to postpone sentencing until the disposition of the cases against Simpson. At Simpson's preliminary examination, Kidd stated that his lawyer requested that his sentence be postponed until after he testified against Simpson. The lower court docketing sheet in Kidd's case, however, shows that Kidd's sentencing was adjourned five times at the *prosecutor's* request. Kidd was sentenced on August 28, 1986, which was several days after Simpson was sentenced, as the prosecutor mentioned. Defendant was convicted on August 13, 1986, which the prosecutor also mentioned at Kidd's sentencing. Defendant argues that this shows that Kidd's prosecutor postponed his sentencing while awaiting the result in defendant's trial, which evidences an agreement. We are not convinced that the docket sheet entries conclusively show that the prosecutor alone requested the postponement because it appears from the transcripts from Kidd's guilty pleas and Simpson's preliminary examination that Kidd's counsel participated in the decision to postpone sentencing. The evidence just as likely shows that sentencing was postponed while the parties were awaiting Simpson's sentence. Accordingly, defendant is unable to demonstrate that an agreement was made for Kidd's testimony against defendant.

We conclude that any error the trial court committed in denying defense counsel's discovery request was harmless. *Whittaker, supra* at 427. The trial court made a determination of Kidd's credibility, considering the possible effect of Floyd's reward money, incentive to

fabricate a story, Kidd's criminal record, the fact that the witnesses did not all know one another, the fact that he did not implicate Coats and Whitlow, and the fact that defendant only described two gunshots when admitting the crime to Kidd. Defendant has failed show that the reliability of the verdict was undermined by any such error.

IX. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct in failing to turn exculpatory information over to defense counsel, failing to produce a requested witness, and eliciting evidence of other crimes that defendant allegedly committed. To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Because defendant failed to raise this issue at trial, we review his claims for plain error affecting his substantial rights. *Carines*, *supra* at 763; *Ackerman*, *supra* at 448. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines*, *supra* at 763.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted from the alleged misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). While there is no general constitutional right to discovery in a criminal case, defendants have a "due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *Stanaway, supra* at 664-666. The test for whether the material should have been provided to a defendant is whether it contains information that probably would have changed the outcome of the trial. *Id.* at 666. Prosecutors may not knowingly use false testimony to obtain a conviction, and they have a duty to correct false evidence. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

As we concluded, *supra*, there is no evidence that Kidd made any agreements in exchange for his testimony against defendant. Although he may have *hoped* to receive a lighter sentence in consideration for his testimony, there was no evidence that any actual agreements existed. As is also discussed, *supra*, we are not convinced that Kidd blamed another murder on defendant. Therefore, defendant's arguments that the prosecutor violated his duty to turn over exculpatory information with regard to these two items are meritless.

Defendant also argues that the prosecutor failed to turn over to defense counsel the statement of Thomas Brown. Brown managed the building where the shop was located and visited the shop on the day of the robbery and murder. After Officer Day testified, the prosecutor attempted to enter a stipulation to waive Brown's testimony. Defense counsel refused to waive Brown's testimony because he was unable to locate his copy of Brown's statement. He did, however, obtain another copy from Officer Day at that time. Brown's statement was later admitted into evidence, and defense counsel stipulated to waive Brown's testimony. When the trial court asked defendant if this stipulation was correct, defendant replied, "yes," and the trial court accepted the stipulation. Because defendant's agreement to this stipulation constitutes a waiver that actually extinguishes any error, defendant's argument is misplaced. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant also argues that the prosecutor failed to turn Henderson's letter over to defense counsel. Although defense counsel did not have a copy when he conducted cross-examination of Floyd, he obtained a copy before Henderson's cross-examination and impeached Henderson with the contents of the letter. During his closing argument, trial counsel argued extensively about the letter, maintaining that defendant was not even at the shop because the letter did not say anything about Henderson witnessing the whole incident. Accordingly, we are unable to conclude that defendant suffered any prejudice by trial counsel's late receipt of Henderson's letter.

Defendant also contends that the prosecution failed to produce a requested witness, Sergeant Kramer, who was taking a medical disability leave from work. Defendants have a due process right to obtain "evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment." *Stanaway, supra* at 666, applying *Brady, supra*. Defendant asserts that Sergeant Kramer's testimony would have shown that Floyd lied about defendant selling him the stolen necklace after the robbery and murder because Sergeant Kramer had not listed the necklace on a draft of the warrant request recommendation. Trial counsel stated that he "probably would be contented with William Rice's testimony instead of Sergeant Kramer's." Although Officer Rice was not able to testify about the warrant request recommendation as counsel had hoped, he later waived Sergeant Kramer's testimony. Because a waiver actually extinguishes any error, defendant is not entitled to relief on this issue. *Carter, supra* at 215-216.

Defendant also alleges that the prosecutor elicited evidence of other crimes from Kidd, infringing upon the presumption of defendant's innocence. As we concluded, *supra,* the prosecutor did not elicit this information from Kidd. The information was voluntary and nonresponsive to proper questions, and we presume that the trial court did not consider the comments in making its decision. *Oliver, supra* at 49; *Garfield, supra* at 79.

Because we are not persuaded that defendant was prejudiced by the prosecutor's conduct at trial, we conclude that there was no prosecutorial misconduct. *Abraham, supra* at 272.

X. Bench Trial Findings of Fact

Defendant claims that the trial court erred in its findings of fact at the bench trial. We review a trial court's findings of fact for clear error, giving regard to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *In re Forfeiture of US Currency,* 164 Mich App 171, 179; 416 NW2d 700 (1987). A finding of fact is clearly erroneous if, after reviewing the entire record, we are left with a "definite and firm conviction that a mistake has been made." *People v Bolduc,* 263 Mich App 430, 436; 688 NW2d 316 (2004).

The trial court indicated that its decision in this case depended on Henderson's letter as well as the testimony of Henderson, Walls, and Kidd, who all had criminal records. The trial court found that Henderson, Walls, and Kidd did not really know each other and did not have an incentive or animosity against defendant to fabricate a story about him in order to get the reward money. They did not all implicate Coats and Whitlow, which would have made their stories complete and increased their chances at obtaining the reward money. Furthermore, such manufactured testimony would have required a conspiracy among all of them and the police.

The trial court also stated that it considered the possibility that defendant might have been boasting or lying when he told Kidd and Walls that he committed the murder and robbery.

Although it realized that it was somewhat odd that Henderson did not come forward right away, the trial court specifically found Henderson credible. The court discounted his aunt's testimony because she had ten people living in her house at that time of the robbery and murder, and she was not asked about her recollection until a long time after the incidents.

The trial court recognized the discrepancy between the medical examiner's testimony and the testimony of Henderson, Walls, and Kidd about the number of gunshot wounds Wilson sustained. The trial court resolved this by finding that "two to the head" is a common expression and the close proximity of the gun during the one contact wound may have muffled the gunfire enough that someone outside would be unable to hear it.

The trial court did not find any reason to doubt Floyd's credibility or his motives in offering a reward. Although it was aware that the reward might motivate some witnesses to testify, the trial court recognized that it was at least a year after the robbery and murder before some of the witnesses surfaced. The trial court found it to be a "crap shoot" for someone to come forward and did not believe it was something a reasonable person would do out of fear of being labeled a snitch or squealer in the neighborhood.

The trial court considered defendant's testimony and addressed two inconsistencies. First, defendant testified that Floyd was willing to give him $15 for a ring, but he took a $10 loan instead. The trial court mistakenly stated that defendant had testified that he was not behind the Plexiglas partition while he was on the phone with Floyd. The trial court noted that defendant's fingerprint was found on the telephone behind the Plexiglas and Floyd had received from defendant what he recognized as a stolen necklace after the robbery and murder.

Although the trial court did make one error in its findings of fact, we conclude that the findings were not clearly erroneous. Defendant observed that Wilson was an easy target before the robbery and murder. An eyewitness saw defendant in the shop at the time of the robbery and murder. Defendant's fingerprint was found on the telephone, indicating that he was behind the Plexiglas partition. Floyd recognized a stolen necklace that defendant sold to him after the robbery and murder, and defendant admitted his involvement in the robbery and murder to three people. After reviewing the entire record, we are not left with a "definite and firm conviction that a mistake has been made." *Bolduc, supra* at 436.

XI. Newly Discovered Evidence

Defendant asserts that he is entitled to a new trial on the basis of newly discovered evidence, which consists of the testimony of two recanting witnesses and one new witness. A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Cress***,** 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Mechura,* 205 Mich App 481, 483; 517 NW2d 797 (1994). "In reviewing the trial court's decision, due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witness and other trial witnesses." *Canter, supra* at 559.

Defendant raised this issue of newly discovered evidence in a motion for relief from judgment before the trial court, which conducted an evidentiary hearing. For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress, supra* at 692.

At the evidentiary hearing, Kidd recanted his trial testimony, testifying that defendant had not made comments to him about planning to rob the shop or admitting his involvement in the robbery and murder. Kidd explained that he testified falsely at defendant's trial for the following reasons: 1) defendant had been "messing" with Kidd's women; 2) Kidd hoped to get less prison time in his own case; and 3) he thought he could get some of Floyd's reward money. In exchange for a reduction of the first-degree murder charge to second-degree murder and dismissal of other charges, Kidd testified against his codefendant and pleaded guilty to second-degree murder and armed robbery. Although he expected the prosecutor from defendant's case to help him get a reduced sentence, Kidd was sentenced to life in prison with the possibility of parole. Kidd admitted that he had not been promised anything in writing for his trial testimony; he thought he might get a reduced sentence if he helped convict defendant.

Kidd testified that he had received less than $1000, but perhaps as much as $800 or $900 from Floyd, but Floyd testified that he never gave Kidd any money. Kidd and defendant had since "made up," and they had spent time together in quarantine in prison in 1996. Kidd testified that he and Henderson received special privileges while in the Wayne County jail because they were "rats." They were allowed out of their cells, they were able to make money, and they were allowed to have sex with female visitors.

Nelson testified that he saw three boys run out of the shop carrying handguns, and none of them was defendant, who he recognized from around the neighborhood. Nelson and defendant were in prison together in 1996. The attendance records from Nelson's school indicate that he was not absent on the day of the robbery and murder.

At the evidentiary hearing, Henderson recanted his trial testimony, testifying that he was not near the shop on the day of the robbery and murder and that he did not hear defendant make any comments about robbing the shop before or after the robbery occurred. Henderson also said that it was not possible to see inside the shop from where he said he was standing. Henderson explained that he had given false testimony for the following reasons: 1) defendant abandoned him and left him homeless when defendant entered drug rehabilitation;[4] 2) he wanted Floyd's reward money; 3) the prosecutor threatened him; and 4) he received benefits from the police while waiting to testify. Henderson also falsely implicated Whitlow and Coats because they had withheld the proceeds of a robbery from him. When one of Whitlow's friends found out about Henderson's original statement to the police, he hit Henderson and drove him to the police

[4] Henderson later testified that he lived with his mother in Inkster and could not explain why he did not go to live with her when defendant entered the rehabilitation facility.

station to change his statement. Henderson did not change his statement because he was scared. Although Floyd did not give him the entire amount of the reward, he had given him as much as $800. Before agreeing to testify at the evidentiary hearing, Henderson's attorney asked the prosecutor if Henderson would receive "protection or separation" while incarcerated if he chose not to testify.

The prosecutor presented evidence that Henderson and Nelson each received a $20 deposit to their jail accounts. Defendant's mother visited the jail the day these deposits were made, and the money orders were purchased at a store less than .1 miles from her house.

Floyd testified at the evidentiary hearing and produced four letters that he received from Henderson. Henderson wrote that he was afraid that someone might hurt him in prison, he was fearful of defendant, and he wanted protective custody. Floyd testified that he paid Henderson the entire $3000 reward. He also gave Henderson $20 twice for cigarettes after the trial while Henderson was in jail.

The trial court concluded that introduction of the evidence was not likely to achieve a different result on retrial, specifically stating that the testimony of Henderson, Kidd, and Nelson was not credible. The trial court denied defendant's motion for relief from judgment.

Michigan courts are reluctant to grant new trials based on recantation testimony because "where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *Canter*, *supra* at 559. We are mindful that the trial court is in the best position to appraise the credibility of a recanting witness. *Id.* Because the trial court did not accept the recantation testimony as valid, a different result is improbable on retrial. *Cress*, *supra* at 692. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant a new trial.

XII. Cumulative Error

Lastly, defendant claims that the cumulative effect of these errors denied him a fair trial. We review a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

The cumulative effect of several minor errors may warrant reversal even where the individual errors in the case would not warrant reversal. *Hill*, *supra* at 152. Cumulative error actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error. *LeBlanc*, *supra* at 591-592 n 12 (emphasis in original). Only the unfair prejudice of several actual errors can be aggregated to satisfy the standards set forth in *Carines*, *supra* at 774. *LeBlanc*, *supra* at 591-592 n 12. Because we have determined, *supra*, that defendant was not prejudiced by any errors, "this issue is without merit." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

Affirmed.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage